STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2014
v	No. 308843 Washtenaw Circuit Court
NILES LYNDON JOHNSON, Defendant-Appellant.	LC No. 11-000798-FH

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Defendant Niles Lyndon Johnson appeals as of right his jury trial conviction of assault with intent to rob while unarmed, MCL 750.88. Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to a term of 36 to 180 months' imprisonment, with 162 days' credit. We remanded this case to the trial court for a hearing on whether the defendant's shackles were visible to any juror during the trial. The trial court held an evidentiary hearing and found that none of the jurors saw the shackles. We affirm.

This case arises out of an incident where defendant physically beat Nestor Bonilla. At trial, Bonilla and Meghan Robitaille, a witness to the incident, testified that defendant demanded money from Bonilla and then beat Bonilla when Bonilla attempted to walk away from him.

Defendant first argues that his right to due process was violated because his ankles were shackled during trial. We review this unpreserved claim of error for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id*. (citations and quotations omitted).

Defendants have a due process right to be free of physical restraints that are visible to the jury during trial unless the trial court determines that a state interest specific to the trial is served by use of the restraints. *Deck v Missouri*, 544 US 622, 629; 125 S Ct 2007; 161 L Ed 2d 953 (2005). "[T]he shackling of a defendant during trial is permitted only in extraordinary circumstances." *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996) (citations omitted). Even when a defendant's shackles are not visible to the jury, a defendant may only be

shackled when the trial court states the reason for doing so and that reason is supported by record evidence. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009), citing *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). However, where a trial court errs in shackling a defendant, a defendant must show prejudice resulting from the use of the restraints in order to receive relief. A defendant is not prejudiced where the jury was unable to see the shackles on the defendant. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008) (citation omitted); *Payne*, 285 Mich App at 186.

The trial court plainly erred because it failed to make a determination, stated on the record and based on record evidence, that the restraints were necessary for a state interest specific to the trial. *Payne*, 285 Mich App at 186, citing *Dunn*, 446 Mich at 425. As we noted the trial court held an evidentiary hearing and found that the shackles were not seen. We defer to the trial court's factual findings. *People v Eliason*, 300 Mich App 293, 304; 833 NW2d 357 (2013). Therefore, defendant cannot demonstrate prejudice because a defendant is not prejudiced where the jury was unable to see the shackles. *Payne*, 285 Mich App at 186; *Horn*, 279 Mich App at 36. Defendant has not shown that the plain error affected his substantial rights. *Carines*, 460 Mich at 763.

Defendant next asserts that his trial counsel's failure to object to the use of the shackles constituted ineffective assistance of counsel. Because no *Ginther*[1] hearing was held, our review of the issue is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted). There is a strong presumption that trial counsel's action was sound trial strategy. *Id.* To show prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Toma*, 462 Mich at 302-303 (quotations and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994) (quotations and citation omitted).

We agree with defendant that, on the record before us, counsel's failure to object to shackling fell below an objective standard of reasonableness. However, defendant cannot show prejudice. The record contains no evidence showing that any juror saw defendant wearing shackles. Defendant is thus unable to show that there is a reasonable probability that the outcome of the trial would have been different had his counsel objected.

Defendant next asserts that the trial court violated his right of confrontation when it prohibited his counsel from questioning Bonilla on whether he was legally in the United States. Review of a defendant's unpreserved claim that he was deprived of his Sixth Amendment right

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

of confrontation is reviewed for plain error. *People v McPherson*, 263 Mich App 124, 138; 687 NW2d 370 (2004); *Carines*, 460 Mich at 763.

The Sixth Amendment of the United States Constitution provides "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. "Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination." *Davis v Alaska*, 415 US 308, 315; 94 S Ct 1105; 39 L Ed 2d 347 (1974) (quotations and citation omitted). "A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998) (citation omitted). However, "[n]either the Sixth Amendment's Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992) (citations omitted). Accordingly, "[c]ross-examination may be denied with respect to collateral matters bearing only on general credibility, as well as on irrelevant issues." *Id*. "If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact." *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995). "A witness's bias is always relevant. [A] defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony." *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005) (citations and quotations omitted).

We conclude that whether Bonilla was lawfully in the United States was a "collateral matter[] bearing only on general credibility," *Canter*, 197 Mich App at 564; thus, the trial court could prohibit the questioning without violating defendant's right of confrontation. *Id*. At most, Bonilla's immigration status was relevant to his character for truthfulness generally. It would not tend to show whether Bonilla was "truthfully and accurately testifying" to the matters *actually* at issue. See *Mills*, 450 Mich at 72. Whether Bonilla was legally in the United States was unrelated to the defendant's theory of defense because the theory of defense was not that Bonilla fabricated the entire incident; rather, defense counsel conceded that defendant assaulted Bonilla but argued that he did not rob or intend to rob Bonilla. Therefore, the questioning was only related to a collateral matter that bore generally on Bonilla's general credibility, and thus, the trial court could prohibit cross-examination on it without violating defendant's right of confrontation. *Canter*, 197 Mich App at 564. Additionally, defendant's inability to ask this question did not present a failure to "plac[e] before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might [have been] inferred." *Kelly*, 231 Mich App at 644. The jury would have been unable to infer bias from Bonilla's immigration status alone. Moreover, there are no prior Michigan cases holding that a witness's illegal residency in this country renders him inherently biased towards the prosecution; thus, even if we concluded that one's illegal immigration status is a fact showing bias, which we do not, any error would not have been "clear or obvious," thus, not plain. *Carines*, 460 Mich at 763. Further, the failure to cross-examine Bonilla on his immigration status did not cause a failure to present facts in front of the jury from which prejudice could have been inferred. In sum, the trial court did not plainly err by prohibiting cross-examination on this subject.

Defendant also argues that the trial court acted contrary to MRE 608(b), the evidentiary rule addressing character evidence of a witness, by prohibiting defense counsel from cross-

examining Bonilla on his immigration status. We decline to address this issue because it has not been properly presented for appellate review where it was not identified in defendant's statement of questions presented in his brief on appeal. See MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009).

Defendant next asserts that the trial court acted contrary to MRE 608(b) when it prohibited defense counsel from cross-examining Detective Annette Coppock about whether Robitaille received leniency for her testimony and that this also violated his right of confrontation. We review unpreserved errors for plain error. *Carines*, 460 Mich at 763.

Although both parties argue that MRE 608(b) controls whether defense counsel was permitted to question Coppock about whether Robitaille received leniency in exchange for her testimony, MRE 608 was not implicated by this question. MRE 608(b) addresses evidence of specific instances of conduct of a witness. It provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

When construing a court rule, we must enforce it as written if the rule's language is plain and unambiguous. *People v Harlan*, 258 Mich App 137, 143; 669 NW2d 872 (2003). A court may refer to a dictionary to discern the plain meaning of a rule. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). *Random House Webster's College Dictionary* (1997) defines "conduct" as "personal behavior; way of acting; deportment." MRE 608(b)'s plain language addresses "[s]pecific instances of the *conduct* of a witness." Whether Robitaille was offered leniency in exchange for her testimony did not implicate a specific instance of Robitaille's *conduct*, specifically her "personal behavior; way of acting; [or] deportment." There was no plain error.

Defendant further argues that the prohibition on cross-examination of Coppock related to an offer of leniency for Robitaille violated his right of confrontation. "A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias . . . of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *Kelly*, 231 Mich App at 644. The prohibited question related to Robitaille's bias, which is always a relevant issue that a defendant is entitled to have a jury consider. *McGhee*, 268 Mich App at 637. Defendant's right of confrontation was thus violated by the trial court's preclusion of the question. Regardless, defendant cannot show that it is more probable than not that the outcome of trial would have been different had this question been permitted. In addition to the consistency of the details between Robitaille's testimony and Bonilla's testimony about the assault, officer testimony corroborated some details of Robitaille's testimony. An officer testified that the search of the apartment where the assault and robbery took place resulted in officers finding evidence that was consistent with Robitaille's account. Consequently,

defendant has not shown that this plain error affected a substantial right because he has not shown that it affected the outcome of trial.

Defendant further asserts that his right of confrontation was violated because "the court prevented the defense from cross-examining Detective Coppock about the integrity of the state's investigatory methods." Aside from his brief articulation of the asserted violation, defendant does not expand on his argument and cites no authority actually supporting it. Consequently, this issue is wholly abandoned and we need not address it. *Kelly*, 231 Mich App at 640-641 ("[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

Finally, we note that defendant asserts in a footnote that the prosecution's failure to disclose whether Robitaille received leniency may constitute a *Brady*[2] violation. We decline to address this issue because it has not been properly presented for our review where it was not identified in defendant's statement of questions presented in his brief on appeal. See MCR 7.212(C)(5); *Anderson*, 284 Mich App at 16.

Affirmed.

/s/ Jane E. Markey
/s/ Cynthia Diane Stephens

[2] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).